U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 02 June 2005

Case No. : 2004-BLA-5252

In the Matter of:

WILLIE L. JEFFERSON,
Claimant

v.

ZEIGLER COAL COMPANY,
Employer

OLD REPUBLIC INSURANCE COMPANY,
Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest

APPEARANCES:[1]

Ellen S. Bowles, Esq.
For the Claimant

Natalee A. Gilmore, Esq.
For the Employer

BEFORE: Robert L. Hillyard
Administrative Law Judge

DECISION AND ORDER - DENIAL OF BENEFITS

This proceeding arises from a claim filed by Willie L. Jefferson for benefits under the Black Lung Benefits Act of 1977, 30 U.S.C. §§ 901, *et seq.*, as amended ("Act"). In accordance with the Act, and the regulations issued thereunder, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs, for a formal hearing.

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[1] The Director, OWCP, was not represented at the hearing.

Benefits under the Act are awarded to persons who are totally disabled within the meaning of the Act due to pneumoconiosis, or to the survivors of persons who were totally disabled at the time of their death or whose death was caused by pneumoconiosis. Pneumoconiosis is a dust disease of the lungs arising out of coal mine employment, commonly known as black lung.

A formal hearing in this case was held in Madisonville, Kentucky, on January 25, 2005. Each party was afforded full opportunity to present evidence and argument at the hearing as provided in the Act and the regulations issued thereunder, which are found in Title 20 of the Code of Federal Regulations. Regulation section numbers mentioned in this Decision and Order refer to sections of that Title.

The findings and conclusions that follow are based upon my observation of the appearance and the demeanor of the witness who testified at the hearing, and upon a careful analysis of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent case law.

I. Statement of the Case

The Claimant, Willie L. Jefferson, filed a claim for black lung benefits pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, on June 28, 2002 (DX 3).[2] A Notice of Claim was issued on August 8, 2002, identifying Zeigler Coal Company, as the putative responsible operator (DX 21). On November 13, 2002, the Employer filed its Response to Notice of Claim and on August 23, 2002, the Employer filed its Controversion (DX 22, 24). The District Director, OWCP, denied benefits on April 25, 2003 (DX 30). The Claimant requested a formal hearing and the claim was referred to the Office of Administrative Law Judges on November 3, 2003 (DX 35).

A hearing was held in Madisonville, Kentucky, on January 25, 2005, before the undersigned Administrative Law Judge. The record was held open for 45 days for submission of briefs (Tr. 33).

The Claimant filed previous claims in 1974 and 1989 (DX 1). The 1989 claim was finally denied by Decision and Order dated April 28, 1999, because the Miner failed to establish any element of entitlement.

[2] In this Decision, "DX" refers to the Director's Exhibits, "CX" refers to the Claimant's Exhibits, "EX" refers to the Employer's Exhibits, and "Tr." refers to the transcript of the formal hearing.

Evidentiary Issues

At the hearing, the Claimant, through counsel, objected to the admission of Director's Exhibit No. 1, arguing that the Employer's reliance on that medical evidence would cause them to exceed the evidence permitted under § 725.414 (Tr. 5-6). The Employer responded that they submitted an Evidence Summary Form which includes medical evidence from Director's Exhibit No. 1, and that the designations made on the form comply with the evidentiary limitations contained in the revised regulations (Tr. 6-7). A review of the Employer's Black Lung Benefits Act Evidence Summary Form shows that the Employer has designated evidence in compliance with the limitations contained in § 725.414 with the exception of Dr. Wiot's interpretation of the November 22, 1996, x-ray film and the February 12, 1998, x-ray film (DX 1). Dr. Wiot's reading of these two films is designated as rebuttal evidence. Under § 725.414(a)(3)(ii), the Employer is permitted to submit one x-ray rebuttal reading for each interpretation submitted by the Claimant. As the Claimant has not designated the November 22, 1996, or the February 12, 1998, x-rays as part of its affirmative case, Dr. Wiot's interpretations do not rebut an x-ray of record. The Claimant's objection to the admission of Director's Exhibit No. 1 is overruled. Director's Exhibit No. 1, as designated in the Employer's Evidence Summary Form, is admitted into the record. Dr. Wiot's interpretations of the November 22, 1996, and the February 12, 1998, x-ray films exceed the evidentiary limitations of § 725.414, and they will not be considered.

At the hearing, the Employer objected to the Claimant's introduction of the February 12, 1998, x-ray reading by Dr. Westerfield as rebuttal evidence, stating that the film was not listed as part of the Employer's affirmative case and that Dr. Westerfield's interpretation, therefore, does not rebut an x-ray film of record as required under § 725.414(a)(2)(ii) (Tr. 7-8). The Employer is correct, and the February 12, 1998, x-ray interpretation of Dr. Westerfield will not be considered in this Decision and Order.

At the hearing, the Employer objected to Claimant's Exhibit No. 8, a refiling of the 1993 medical report of Dr. Fennelly from Director's Exhibit No. 1. As the Claimant has not designated the report of Dr. Fennelly as part of its affirmative case, Claimant's Exhibit No. 8 is not admitted, and I do not further consider the report of Dr. Fennelly.

II. Issues[3]

The issues as listed on Form CM-1025 are:

1. Whether the claim was timely filed;

[3] At the hearing, the Employer withdrew the issues of miner, post-1969 employment, and length of employment. The parties stipulated to 30 years of coal mine employment (Tr. 14-15).

2. Whether the Miner has pneumoconiosis as defined by the Act and the regulations;

3. Whether the Miner's pneumoconiosis arose out of coal mine employment;

4. Whether the Miner is totally disabled;

5. Whether the Miner's disability is due to pneumoconiosis;

6. The number of dependents for purposes of augmentation of benefits;

7. Whether the named Employer is properly named as Responsible Operator;

8. Whether the Miner established a material change in condition pursuant to § 725.309(d);

9. Whether the Miner's hearing request was timely; and,

10. The remaining issues set forth in paragraph 18, as well as the issues as to constitutionality of the Act and its regulations are preserved for appeal purposes.

III. Findings of Fact and Conclusions of Law

The Claimant, Willie L. Jefferson, was born on February 25, 1925 (Tr. 16; DX 3). He completed the eighth grade (DX 3). The Claimant has two dependents for purposes of augmentation of benefits; namely, his wife, Brenda Sue Jefferson, whom he married on June 30, 1978, and a disabled daughter, Tracy Lynn Jefferson (DX 14, 15, 16; Tr. 17).

The Claimant testified that he smoked less than one pack of cigarettes per week for several years, quitting 20-25 years ago (Tr. 23). The physicians' records support this testimony. I find, therefore, that the Claimant has a smoking history of 15 years (1947-1962, *see* DX 18), at a rate of less than one pack of cigarettes per week.

Timeliness of Filing the Claim

The Employer contests that the Miner timely filed his claim for benefits. Section 725.308(c) creates a rebuttable presumption that every claim for benefits is timely filed. The Employer has submitted no evidence to rebut the presumption and the record contains no evidence that the Claimant received the requisite notice more than three years prior to filing his claim for benefits. Therefore, I find that this claim was timely filed.

Timely Hearing Request by the Claimant

On Form CM-1025, the Director contests that the Miner timely requested a formal hearing before an Administrative Law Judge. Under § 725.419(a), within 30 days after the issuance of a proposed decision and order, any party may request a hearing. The Director's Proposed Decision and Order was issued on April 25, 2003 (DX 30). The Miner, without the assistance of counsel, submitted a letter requesting a formal hearing on June 2, 2003 (DX 31).

On June 4, 2003, the Director's office sent a letter to Ziegler Coal Company, stating in part:

> We have received a timely request that the case be referred to the Office of Administrative Law Judges for a formal hearing, and we are in the process of preparing the statement of contested and uncontested issues required by 20 C.F.R. § 725.421(b)(7).

See DX 32 (emphasis added).

Under § 725.310, a claimant may, at any time before one year after the denial of a claim, request modification. Modification proceedings must be initiated at the District Director level. Section 725.310(b). If the Director believed the Miner's request for a hearing was untimely, he should have processed the Miner's June 2, 2003, letter as a request for modification and not as a request for hearing. Instead the Director notified the Employer that the hearing request was timely and the claim was forwarded to the Office of Administrative Law Judges for scheduling of a formal hearing. On Form CM-1025, the Director contests that the Miner has established a material change in conditions as required in a subsequent claim under § 725.309 and does not contest the issue of modification. Both the Claimant and the Employer have litigated this case as a subsequent claim. To waste all of the resources used to litigate the claim to this point by remanding the claim back to the District Director for modification proceedings and/or a renewed hearing request process that often takes between one and two years would be a futile act. The law does not require futile acts.

At the time of the June 2, 2003, letter the Claimant was 77 years old, had an 8th-grade education and was operating without the assistance of counsel. The Director did not appear at the hearing, nor did he submit a brief in support of his position. I find that the Director, through his actions in this case, has waived the issue of a timely hearing request by the Miner. Noting the Miner's advanced age, his education level, and the fact that he operated without assistance of counsel, I find that the Miner's hearing request was timely under the circumstances presented in this particular claim and I consider the claim as a timely appeal by the Claimant requesting a formal hearing of a subsequent claim under § 725.309.

Coal Mine Employment

Section 725.101(a)(32)(ii) directs an adjudication officer to determine the beginning and ending dates of coal mine employment by using any credible evidence. At the hearing, the parties stipulated to 30 years of coal mine employment (Tr. 14-15).

The Claimant's Employment History form lists coal mine employment from 1944-1976 (DX 6). The Claimant's FICA Earnings worksheet shows coal mine employment from 1944-1977 (DX 12). I find that the record supports the stipulation and that the Claimant has established 30 years of coal mine employment. On his Employment History, the Claimant stated that over the relevant period he was a shuttle car driver, a timber man, a bottom lifter, and a loader runner (DX 7).

The Claimant's last employment was in the Commonwealth of Kentucky; therefore, the law of the Sixth Circuit is controlling.

Responsible Operator

Ziegler Coal Company contests the issue of Responsible Operator. In its Supplemental Operator Response to Notice of Claim (DX 24), the Employer denies all grounds for being named responsible operator in this claim. The Employer has produced no evidence in support of its position, however, and has likewise offered no argument in its closing brief. In review of the employment evidence found in the record (DX 6, 7, 12), I find that Zeigler Coal Company is properly named as responsible operator under §§ 725.494, 725.495.

IV. Medical Evidence

X-ray Studies[4]

	Date	Exhibit	Doctor	Reading	Standard
1.	08/28/03	EX 1	Selby B reader[5]	Negative	Good

[4] In his Black Lung Benefits Evidence Summary form, the Claimant designated the February 12, 1998, x-ray interpretation of Dr. Westerfield as rebuttal Evidence (CX 5). The Employer designated the July 19, 1993, interpretation of Dr. Spitz (DX 1) and the February 12, 1998, and November 26, 1996, interpretations of Dr. Wiot (DX 1) as rebuttal evidence. Under § 725.414(a), each party may submit one rebuttal interpretation of each x-ray submitted by an opposing party. As none of the above listed x-rays is designated in either party's affirmative case, the interpretations listed do not rebut any x-ray of record. These interpretations, therefore, will receive no further consideration in this Decision and Order.

[5] A "B reader" is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successfully completing an examination conducted by or on behalf of the Department of Health and Human Services. *See* 42 C.F.R. § 37.51(b)(2).

2.	12/19/02	DX 27	Repsher B reader	Negative	Good
3.	08/27/02	DX 19	Barrett B reader Board cert.[6]	Quality only	Good
4.	08/27/02	DX 18	Simpao	2/1, s/p	Good
5.	08/27/02	EX 3	Wiot B reader Board cert.	Negative	Good
6.	09/05/97	CX 2	Whitehead B reader Board cert.	1/1, p/q	Good
7.	09/05/97	DX 1	Sargent B reader Board cert.	Negative	Good
8.	04/03/95	CX 1	Baker	pneumo.	Not listed
		Note: Small rounded opacities, mid/lower zones consistent with pneumoconiosis.			
9.	04/03/95	DX 1	Sargent B reader Board cert.	Negative	Good

[6] A Board-certified Radiologist is a physician who is certified in Radiology or Diagnostic Roentgenology by the American Board of Radiology or the American Osteopathic Association. *See* § 718.202(a)(ii)(C).

Pulmonary Function Studies

	Date	Exh.	Doctor	Age/Hgt.[7]	FEV_1	MVV	FVC	FEV_1/ FVC	Standards
1.	08/28/03	EX 1	Selby	78/69″	2.16	- -	3.36	64%	Tracings included/ Inconsistent effort/poor comprehension
			Note: No MVV performed.						
2.	12/19/02	DX 27	Repsher	77/70″	2.42	73	3.37	72%	Tracings included/ Minimal coop./coop. Spirometry invalid
				Post-Bronch.	2.38	---	3.13	76%	
3.	08/27/02	DX 18	Simpao	77/70″	2.62	59	3.46	76%	Tracings included; Good coop./comp.
4.	09/05/97	CX 4	Houser	72/71″	2.69	- -	3.49	77.1%	Tracings included; Coop./comp. not listed
			Note: No MVV performed.						
5.	11/22/96	CX 5	Simpao	71/71″	2.56	79	3.52	73%	Tracings Included, Good coop./ comp.

Arterial Blood Gas Studies

	Date	Exhibit	Physician	pCO_2	pO_2
1.	08/23/03	EX 1	Selby	38	87
2.	12/19/02	DX 27	Repsher	38.8	72.8
3.	08/27/02	DX 18	Simpao	27.0	79.0

[7] The factfinder must resolve conflicting heights of the miner recorded on the ventilatory study reports in the claim. *Protopappas v. Director, OWCP*, 6 B.L.R. 1-221 (1983). I find the Miner's height to be 70″.

Narrative Medical Evidence

1. a. Dr. Jeff W. Selby, a Board-certified Pulmonologist, Critical Care Specialist, and B reader, examined the Claimant on August 28, 2003 (EX 1). He noted symptomatology (chest pain), employment history (33 years coal mine employment), individual and family histories (diabetes, coronary bypass surgery, back surgeries, hernia), smoking history (< 1 pack per week, 28 years, quit over 20 years ago), and performed a physical examination (chest normal), chest x-ray (negative), CT scan (negative for pneumo., possible lung cancer), pulmonary function study (inconsistent effort, spirometry invalid but nonqualifying, diffusing capacity and lung volumes normal), and an arterial blood gas study (normal). Dr. Selby diagnosed no pneumoconiosis and opined that the Miner retains the respiratory and pulmonary capacity to perform any and all previous coal mine employment duties. He based his opinion on normal arterial blood gases, negative x-ray and CT scan for pneumoconiosis, and pulmonary function testing which was invalid due to effort and still nonqualifying. He noted several life threatening conditions unrelated to coal mine employment.

b. Dr. Selby was deposed by the Employer on January 10, 2004, when he repeated the findings of his earlier written report (EX 4). He stated that subsequent to his written report, he reviewed the medical reports of Drs. Repsher and Simpao and CT scan interpretations by Drs. Wheeler, Scott, and Sellers. He opined that the additional records reviewed corroborated his opinion.

2. a. Dr. Lawrence Repsher, a Board-certified Internist, Pulmonologist, Medical Examiner, Critical Care Specialist, and B reader, examined the Claimant on December 19, 2002 (DX 27). He reviewed symptomatology (orthopnea, dyspnea, cough, wheezes, PND, ankle edema), employment history (33 years coal mine employment), individual and family histories (hypertension, diabetes), and smoking history (¼ ppd on weekends 12-15 years, quit 1980), and performed a physical examination (chest normal, no rales, rhonchi, wheezes), chest x-ray (0/0), pulmonary function study (mild COPD, lung volumes & diffusing capacity normal), arterial blood gas study (normal), and an EKG (left anterior hemiblock, prior inferior myocardial infarction). Dr. Repsher diagnosed no pneumoconiosis. He based his opinion on negative x-ray evidence, pulmonary function evidence which strongly suggested mild COPD caused by prior cigarette smoking, and normal arterial blood gases. He did not make a total disability diagnosis.

b. Dr. Repsher was deposed by the Employer on January 20, 2005, when he repeated the findings of his earlier written report (EX 5). He opined that the Miner does not suffer from any respiratory impairment based on pulmonary function testing showing normal diffusing capacity and pulmonary readings on the lower end of the normal limits despite poor effort. Dr. Repsher opined that with sufficient effort, the results would be normal. He found negative x-ray and CT scan evidence for pneumoconiosis and opined that arterial blood gases were normal, further

demonstrating no impairment. He disagreed with Dr. Simpao's opinion that arterial blood gas testing was abnormal stating that the arterial blood gas readings were normal for a man of Mr. Jefferson's advanced age. He opined that pulmonary function testing administered by himself, Dr. Simpao, and Dr. Selby all listed poor cooperation and effort as demonstrated by tracing loops.

3. a. Dr. Valentino Simpao, who lists no pulmonary medical credentials, examined the Claimant on August 27, 2002 (DX 18). He noted symptomatology (sputum, wheezing, dyspnea, cough, chest pain, orthopnea, PND), employment history (33 years coal mine employment), individual and family histories (diabetes, hypertension, heart disease 3 x bypass, 3 back surgeries), smoking history (1947-1962, ½ ppd weekends), and performed a physical examination (increased resonance upper chest, crepitations, occ. forced exp. wheeze), chest x-ray (2/1), pulmonary function study (mild restriction), arterial blood gas study (mild hypoxia), and an EKG (left anterior hemiblock, questionable previous anteroseptal infarction). Dr. Simpao diagnosed coal workers' pneumoconiosis. He opined that the Miner suffers from a moderate impairment and that he no longer retains the respiratory capacity to perform his previous work as a roof bolter or to perform comparable work in a dust-free environment. He based his opinion on an abnormal chest x-ray, on arterial blood gas and pulmonary function testing, on reported symptoms, and on physical findings on examination.

b. Dr. Simpao was deposed by the Employer on December 21, 2004, when he repeated the findings in his 2002 written report (EX 6). He opined that wheezing and crepitations are not specific to any particular disease.

c. Dr. Simpao previously examined the Claimant on November 22, 1996 (CX 7). He noted symptomatology (cough, sputum, short of breath), employment history (33 years coal mine employment), individual and family histories (cardiac bypass & back surgeries, hernia, diabetic, hypertensive), smoking history (½ ppd, weekends only, 10-15 years, quit 20 years ago), and performed a physical examination (increased resonance upper chest, crepitations, occasional forced exp. wheeze), chest x-ray (2/1), and pulmonary function study (mild restriction and obstruction). He diagnosed coal workers' pneumoconiosis based on an abnormal x-ray and a history of coal dust exposure. He opined that the Miner no longer retains the pulmonary capacity to perform his usual coal mine work or comparable and gainful work due to his pneumoconiosis. He did not list the basis of his total disability diagnosis.

4. Dr. William C. Houser, a Board-certified Pulmonologist and Critical Care Specialist, examined the Claimant on September 5, 1997 (CX 6). He noted symptomatology (dyspnea, cough, wheezing, sputum, hemoptysis), employment history (33 years coal mine employment), individual and family histories (myocardial infarction, open heart surgery, back operations), smoking history (½ pack per week, quit 30-35 years ago), and performed a physical examination (chest normal), chest x-ray

(1/1, as interpreted by Dr. Whitehead), and a pulmonary function study (mild restriction; nonqualifying). Dr. Houser diagnosed coal workers' pneumoconiosis, chronic bronchitis, and other nonrespiratory conditions. He based his diagnosis on a lengthy exposure history, positive x-ray, and pulmonary function testing showing restriction. He opined that "[s]ince Mr. Jefferson has evidence of coal workers' pneumoconiosis and pulmonary function impairment, he should avoid any additional exposure to coal and rock dust. I believe he has an occupational disability with reference to any additional coal mine employment."

Treatment Notes

The record contains 27 pages of treatment notes from Regional Medical Center dated 1992-2002 (DX 20). The treatment notes show clear lungs, negative x-rays and no diagnoses of pneumoconiosis or pulmonary or respiratory problems. The notes chronicle ongoing severe heart-related conditions.

CT Scan Evidence

Drs. Spitz and Wiot, both Board-certified Radiologists and B readers, interpreted the July 22, 1993, CT scan as negative for pneumoconiosis (DX 1).

Drs. Sellers, Wheeler, Scott, and Wiot (EX 2), all Board-certified Radiologists and B readers, and Dr. Repsher (DX 27), a B reader, interpreted the December 19, 2002, CT scan as negative for pneumoconiosis.

Dr. Selby (EX 1), a B reader, and Dr. Perkins (EX 2), who lists no radiographic credentials, interpreted the August 28, 2003, CT scan as negative for pneumoconiosis.

V. Discussion and Applicable Law

The Claimant filed his black lung benefits claim on June 28, 2002 (DX 3). Because this claim was filed after March 31, 1980, the effective date of Part 718, it must be adjudicated under those regulations.[8]

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. § 718, a claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§ 718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 B.L.R. 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 B.L.R. 1-26

[8] Amendments to the Part 718 regulations became effective on January 19, 2001. Section 718.2 provides that the provisions of § 718 shall, to the extent appropriate, be construed together in the adjudication of all claims.

(1987). Failure to establish any of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 B.L.R. 1-1 (1986) (*en banc*).

Subsequent Claim

The amended regulations contain a threshold standard that the Claimant must meet before a duplicate claim may be reviewed *de novo*.

> A subsequent claim … shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement ... has changed since the date upon which the order denying the prior claim became final.... For example, if the claim was denied because the miner did not meet one or more of the eligibility criteria contained in part 718 of this sub-chapter, the subsequent claim must be denied unless the miner meets at least one of the criteria that he or she did not meet previously.

§ 725.309(c)-(d).

In *Grundy Mining Co. v. Director, OWCP [Flynn]*, 353 F.3d 467 (6th Cir. 2003), a multiple claim arising under the pre-amendment regulations at 20 C.F.R. § 725.309 (2000), the Court reiterated that its previous decision in *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994) requires that the ALJ resolve two specific issues prior to finding a "material change" in a miner's condition: (1) whether the miner has presented evidence generated since the prior denial establishing an element of entitlement previously adjudicated against him; and, (2) whether the newly submitted evidence differs "qualitatively" from evidence previously submitted. Specifically, the *Flynn* Court held that "miners whose claims are governed by this Circuit's precedents must do more than satisfy the strict terms of the one-element test, but must also demonstrate that this change rests upon a qualitatively different evidentiary record." *See also, Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 608-610 (6th Cir. 2001). Once a "material change" is found, then the ALJ must review the entire record *de novo* to determine ultimate entitlement to benefits.

The Claimant's 1989 claim was denied because the Claimant did not establish any element of entitlement (DX 1). To obtain the right to a *de novo* review of his subsequent claim, therefore, the Claimant must first establish one element of entitlement through newly submitted evidence or his claim must be denied without further review pursuant to § 725.309(c)-(d).

Pneumoconiosis

Section 718.202 provides four means to establish the existence of pneumoconiosis. Under § 718.202(a)(1), a finding of pneumoconiosis may be based on x-ray evidence. The record contains eight interpretations of five different chest x-rays.

Dr. Barrett reviewed the August 27, 2002, x-ray film for quality purposes only and rated the film as good (DX 19).

The Board has held that an Administrative Law Judge is not required to defer to the numerical superiority of x-ray evidence, *Wilt v. Wolverine Mining Co.*, 14 B.L.R. 1-65 (1990), although it is within his or her discretion to do so, *Edmiston v. F&R Coal Co.*, 14 B.L.R. 1-65 (1990). However, "administrative fact finders simply cannot consider the quantity of evidence alone, without reference to a difference in the qualifications of the readers or without an examination of the party affiliation of the experts." *Woodward v. Director, OWCP*, 991 F.2d 314 (6th Cir. 1993).

Interpretations of B readers are entitled to greater weight because of their expertise and proficiency in classifying x-rays. *Vance v. Eastern Assoc. Coal Corp., Aimone v. Morrison Knudson Co.*, 8 B.L.R. 1-32 (1985); 8 B.L.R. 1-68 (1985). Combined Board-certified Radiologists and B readers may be accorded still greater weight. *Woodward v. Director, OWCP*, 991 F.2d 314, 316 n.4 (6th Cir. 1993); *Zeigler Coal Co. v. Kelley*, 112 F.3d 839, 842-43 (7th Cir. 1997); *Bethenergy Mines, Inc. v. Cunningham*, Case No. 03-1561 (4th Cir., July 20, 2004) (unpub.).

The August 28, 2003, x-ray was read as negative by Dr. Selby, a B reader. The December 19, 2002, x-ray was read as negative by Dr. Repsher, a B reader.

The August 27, 2002, x-ray was read as negative by Dr. Wiot, a Board-certified Radiologist and B reader, and as positive by Dr. Simpao, who lists no radiographic credentials. I give greater weight to the dually certified reading of Dr. Wiot and find that the August 27, 2002, x-ray evidence is negative for pneumoconiosis.

The September 5, 1997, x-ray was read as negative by Dr. Sargent, a Board-certified Radiologist and B reader, and as positive by Dr. Whitehead, who is also dually certified. With opposing interpretations and identical credentials, I find that the September 5, 1997, x-ray evidence is inconclusive for pneumoconiosis.

The April 3, 1995, x-ray was read as negative by Dr. Sargent, a dually certified physician, and as positive by Dr. Baker, who lists no radiographic credentials. I give greater weight to the more qualified reading by Dr. Sargent and find that the April 3, 1995, x-ray evidence is negative for pneumoconiosis.

As the record does not contain an x-ray that is positive for pneumoconiosis, I find that the existence of pneumoconiosis has not been established pursuant to 20 C.F.R. § 718.202(a)(1).

Section 718.202(a)(2) is inapplicable because there are no biopsy or autopsy results. Section 718.202(a) (3) provides that pneumoconiosis may be established if any one of the several presumptions is found to be applicable. In the instant case, § 718.304

does not apply because there is no x-ray, biopsy, autopsy, or other evidence of large opacities or massive lesions in the lungs. Section 718.305 is not applicable to claims filed after January 1, 1982. Section 718.306 is applicable only in a survivor's claim filed prior to June 30, 1982.

Under § 718.202(a)(4), a determination of the existence of pneumoconiosis may be made if a physician exercising reasoned medical judgment, notwithstanding a negative x-ray, finds that the miner suffers from pneumoconiosis as defined in § 718.201. Pneumoconiosis is defined in § 718.201 as a chronic dust disease of the lung, including respiratory or pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical" pneumoconiosis and statutory, or "legal" pneumoconiosis.

> (1) *Clinical Pneumoconiosis*. 'Clinical pneumoconiosis' consists of those diseases recognized by the medical community as pneumoconiosis, i.e., conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coalmine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.
>
> (2) *Legal Pneumoconiosis*. 'Legal pneumoconiosis' includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coalmine employment.

Section 718.201(a).

For a physician's opinion to be accorded probative value, it must be well reasoned and based upon objective medical evidence. An opinion is reasoned when it contains underlying documentation adequate to support the physician's conclusions. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-22 (1987). Proper documentation exists where the physician sets forth the clinical findings, observations, facts, and other data on which the diagnosis is based. *Id.* A brief and conclusory medical report that lacks supporting evidence may be discredited. *Lucostic v. United States Steel Corp.*, 8 B.L.R. 1-46 (1985); *see also, Mosely v. Peabody Coal Co.*, 769 F.2d 357 (6th Cir. 1985). Further, a medical report may be rejected as unreasoned where the physician fails to explain how his findings support his diagnosis. *Oggero v. Director, OWCP*, 7 B.L.R. 1-860 (1985).

Dr. Selby, a Board-certified Pulmonologist, Critical Care Specialist, and B reader, diagnosed no pneumoconiosis. He based his opinion on normal arterial blood gas

readings, on negative x-ray and CT scan evidence, and on pulmonary function testing that he opined was invalid due to poor effort and yet still produced nonqualifying readings, normal lung volumes, and normal diffusing capacity. Dr. Selby's opinion is based on objective testing and he documents which readings support his diagnosis. Noting Dr. Selby's credentials, I give his opinion substantial weight.

Dr. Repsher, a Board-certified Internist, Pulmonologist, Medical Examiner, Critical Care Specialist, and B reader, diagnosed no pneumoconiosis. He based his opinion on negative x-ray evidence, negative CT scan evidence, normal arterial blood gas readings, and pulmonary function testing which showed nonqualifying readings and normal diffusing capacity despite poor effort by the Claimant. Dr. Repsher's opinion is well reasoned and based on objective evidence. Noting Dr. Repsher's superior credentials, I give his opinion substantial weight.

Dr. Simpao, who lists no pulmonary specialty credentials, diagnosed coal workers' pneumoconiosis based on an abnormal chest x-ray, arterial blood gas testing, pulmonary function study, reported symptoms, and physical examination findings. Dr. Simpao's report is not adequately supported. A more highly qualified physician has refuted Dr. Simpao's x-ray interpretation, and I have found the x-ray evidence as a whole to be negative. Dr. Simpao's arterial blood gas study produced nonqualifying readings. The August 27, 2002, pulmonary function study also produced nonqualifying readings, and Dr. Repsher opined that this test was invalid due to poor effort as demonstrated by the flow loops on the tracings. Dr. Simpao did not address the Miner's normal total lung volumes and diffusing capacity as did the more well-reasoned medical opinions. Dr. Simpao relied on symptoms self-reported by the Miner. Self-reported symptoms are subjective and not objective evidence. Dr. Simpao fails to discuss how physical examination findings support his diagnosis. Noting Dr. Simpao's lack of pulmonary credentials, I give his inadequately supported opinion less weight.

Dr. Houser, a Board-certified Pulmonologist and Critical Care Specialist, diagnosed coal workers' pneumoconiosis and chronic bronchitis. He based his opinion on an abnormal x-ray, a history of coal dust exposure, and pulmonary function testing showing restriction. Dr. Houser relied on the September 5, 1997, positive x-ray reading of Dr. Whitehead, while I have found that film to be inconclusive and the x-ray evidence as a whole to be negative. He relies on pulmonary function testing which produced nonqualifying readings. He did not perform an arterial blood gas test and he did not explain how a normal chest evaluation during examination was consistent with his diagnosis of pneumoconiosis and chronic bronchitis. He did not discuss the Miner's normal total lung volumes and diffusing capacity as did the more well-supported opinions of record. I find that Dr. Houser did not adequately support his diagnosis that the Miner suffers from pneumoconiosis. I give his opinion less weight.

The treatment notes from Regional Medical Center dated 1992-2002 consistently list clear lungs, negative x-rays, and no diagnoses of pneumoconiosis or pulmonary

and/or respiratory problems. I find that the treatment notes do not support the existence of pneumoconiosis.

The record contains nine interpretations of three CT scans. All nine interpretations are negative for pneumoconiosis. The Department of Labor has rejected the view that a CT scan, by itself, "is sufficiently reliable that a negative result effectively rules out the existence of pneumoconiosis." 65 Fed. Reg. 79, 920, 79, 945 (Dec. 20, 2000). Therefore, a CT scan, while arguably the most sophisticated and sensitive test available, must still be measured and weighed based upon the radiological qualifications of the reviewing physician. *Consolidation Coal Co. v. Director, OWCP [Stein],* 294 F.3d 885 (7th Cir. 2002). Board-certified Radiologists and B readers made six of the negative readings. B readers made two negative interpretations. Dr. Perkins, who does not list radiographic credentials in the record, made one negative interpretation. While these nine interpretations cannot rule out the existence of pneumoconiosis, I find that these nine negative interpretations by highly qualified physicians support a finding of no pneumoconiosis.

Taken as a whole, Drs. Selby and Repsher, Pulmonary Specialists and B readers, provide well-reasoned opinions, based upon objective medical evidence, that the Claimant does not suffer from pneumoconiosis as defined in § 718.201. The treatment notes and the negative CT scan interpretations corroborate this finding. The opinions of Drs. Simpao and Houser are not well reasoned. Accordingly, I find that the Claimant has not established the existence of pneumoconiosis through newly submitted evidence under § 718.202(a)(4).

Causal Connection between Pneumoconiosis and Coal Mine Work

Because the Claimant has not established pneumoconiosis, the question of whether it is caused by his coal mine employment is moot. The evidence necessarily fails to establish this element of the claim.

Total Disability

Total disability is defined as the miner's inability, due to a pulmonary or respiratory impairment, to perform his or her usual coal mine work or engage in comparable gainful work in the immediate area of the miner's residence. Section 718.204(b)(1)(i) and (ii). The Claimant must establish by a preponderance of the evidence that his pneumoconiosis was at least a contributing cause of his total disability. *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241 (4th Cir. 1994); *Baumgartner v. Director, OWCP*, 9 B.L.R. 1-65, 1-66 (1986); *Gee v. Moore & Sons*, 9 B.L.R. 1-4, 1-6 (1986) (*en banc*). Total disability can be established pursuant to one of the four standards in § 718.204(b)(2) or through the irrebuttable presumption of § 718.304, which is incorporated into § 718.204(b)(1). The presumption is not invoked here because there is no x-ray evidence of large opacities and no biopsy or equivalent evidence.

Where the presumption does not apply, a miner shall be considered totally disabled if he meets the criteria set forth in § 718.204(b)(2), in the absence of contrary probative evidence. The Board has held that under § 718.204(c), the precursor to § 718.204(b)(2), all relevant probative evidence, both like and unlike, must be weighed together, regardless of the category or type, to determine whether a miner is totally disabled. *Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195, 1-198 (1986); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 B.L.R. 1-231, 1-232 (1987).

Section 718.204(b)(2)(i) permits a finding of total disability when there are pulmonary function studies with FEV_1 values equal to or less than those listed in the tables and either:

1. FVC values equal to or below listed table values; or,
2. MVV values equal to or below listed table values; or,
3. A percentage of 55 or less when the FEV_1 test results are divided by the FVC test results.

The record contains five nonqualifying pulmonary function studies. While Drs. Repsher and Selby opine that some or all of the record pulmonary function tests are invalid due to poor effort, it is important to note that in *Crapp v. U.S. Steel Corp.*, 6 B.L.R. 1-476 (1983), the Board held that nonconforming pulmonary function tests may be entitled to probative value where the results exceed the table values, *i.e.*, the test is nonqualifying. As the Board noted, "[d]espite any deficiency in cooperation and comprehension, the demonstrated ventilatory capacity was still above the table values. Had the claimant understood or cooperated more fully, the test results could only have been higher." I give probative weight to all five nonqualifying pulmonary function tests, and find that pulmonary function evidence does not support total disability.

Total disability may be found under § 718.204(b)(2)(ii) if there are arterial blood gas studies with results equal to or less than those contained in the tables. The record contains three nonqualifying arterial blood gas studies.

There is no evidence presented, nor do the parties contend that the Claimant suffers from cor pulmonale or complicated coal workers' pneumoconiosis.

Under § 718.204(b)(2)(iv) total disability may be found if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevented the miner from engaging in his usual coal mine work or comparable and gainful work.

Dr. Selby opined that the Miner retains the respiratory capacity to perform any and all previous coal mine employment duties. He based his opinion on normal arterial

blood gas readings, on negative x-ray and CT scans, on a normal clinical evaluation of the chest, and on pulmonary function testing which was invalid due to poor effort but still produced nonqualifying readings. Dr. Selby's opinion is documented and supported by objective evidence. Noting his superior credentials as a Pulmonologist, I give his opinion substantial weight.

Dr. Repsher opined that that the Miner does not suffer from any respiratory impairment. He based his opinion on negative CT scan and x-ray evidence, on normal arterial blood gas readings when adjusted for the Miner's advanced age, and on pulmonary function testing which showed normal diffusing capacity and nonqualifying readings despite poor effort by the Claimant. The objective testing supports Dr. Repsher's no impairment diagnosis. Noting Dr. Repsher's superior credentials, I give his opinion substantial weight.

Dr. Simpao opined that the Miner suffers from a moderate impairment and that he no longer retains the respiratory capacity to perform his previous work as a roof bolter. He based his opinion on x-ray evidence, arterial blood gas readings, pulmonary function testing, symptoms, and physical examination findings. As stated above, I have found Dr. Simpao's x-ray film and the x-ray evidence as a whole to be negative. Dr. Simpao relies on arterial blood gas readings, but he does not explain how nonqualifying readings support his diagnosis. Dr. Repsher, a Board-certified Pulmonologist, disagreed with Dr. Simpao's interpretation of the arterial blood gas evidence, stating that the readings taken by Dr. Simpao were completely normal for a man of Mr. Jefferson's advanced age. Dr. Simpao relies on nonqualifying pulmonary function testing and does not explain how nonqualifying objective testing, reported symptoms, and his findings on examination of the chest support his diagnosis. Dr. Simpao has not adequately supported his total disability diagnosis. Noting Dr. Simpao's lack of pulmonary credentials and the unsupported nature of his report, I give his opinion less weight.

Dr. Houser opined that "[s]ince Mr. Jefferson has evidence of coal workers' pneumoconiosis and pulmonary function impairment, he should avoid any additional exposure to coal and rock dust. I believe he has an occupational disability with reference to any additional coal mine employment." An opinion of the inadvisability of returning to coal mine employment because of a pulmonary condition is not the equivalent of a finding of total disability. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567 (6th Cir. 1989); *Taylor v. Evans & Gambrel Co.*, 12 B.L.R. 1-83 (1988); *Justice v. Island Creek Coal Co.*, 11 B.L.R. 1-91 (1988); *Bentley v. Director, OWCP*, 7 B.L.R. 1-612 (1984); *Brusetto v. Kaiser Steel Corp.*, 7 B.L.R. 1-422 (1984). I find that Dr. Houser's opinion does not diagnose total disability and I find that his opinion offers no support for a finding of total pulmonary or respiratory disability.

As a result of nonqualifying pulmonary testing, nonqualifying arterial blood gas testing, and the well-reasoned opinions of Drs. Selby and Repsher that the Claimant

does not suffer from total pulmonary or respiratory disability, I find that newly submitted evidence fails to establish total disability under § 718.204(b)(2).

The Claimant has failed to establish through newly submitted evidence any element of entitlement previously adjudicated against him. It is, therefore, unnecessary to determine whether the newly submitted evidence differs "qualitatively" from the prior evidence. *Grundy, supra.* Pursuant to § 725.309, his claim must be denied without further review as a matter of law.

VI. Entitlement

Willie L. Jefferson, the Claimant, has not established entitlement to benefits under the Act.

VII. Attorney's Fee

The award of an attorney's fee is permitted only in cases in which the claimant is entitled to benefits under the Act. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for representation services rendered in pursuit of the claim.

VIII. ORDER

It is, therefore,

ORDERED that the claim of Willie L. Jefferson for benefits under the Act is hereby DENIED.

A

Robert L. Hillyard
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty (30) days from the date of this Decision by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington, D.C., 20013-7601. A copy of a Notice of Appeal must also be served upon Donald S. Shire, Esq., 200 Constitution Avenue, N.W., Room N-2117, Washington, D.C., 20210.